NO. 489805-II

STATE OF WASHINGTON COURT OF APPEALS FOR DIVISION II

JOHN WORTHINGTON,

Appellants

v.

WSLCB ET AL,

Respondents

APPELLANT'S AMENDED OPENING BRIEF

John Worthington
4500 SE 2ND PL.
Renton WA.98059

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I. INTRODUCTION

This is an action for disclosure of public records and for costs, fees, and penalties in regard to the Washington State Liquor Control Board's (WSLCB) deliberate failure to reasonably disclose records, silent withholding of public records, destruction of records, failure to provide an adequate privilege log, failure to disclose records in a timely fashion without unreasonable delay, and/or the assertion of improper and invalid exemptions.

This case presents critical questions of law and process in regards to rulemaking in Washington State under the APA and the requirements of the PRA. If the Washington State Liquor Control Board is successful in their defense of this appeal, other agencies conducting rulemaking will be able to work from one rulemaking file, and then create another for the public. The crux of this case is whether the appellate courts will read the PRA in unison with the APA and uphold RCW 34.05.370 (h), or render it superfluous, or whether the appellate court will

allow the trial court to add words to the APA statute to account for the terms "final" and "working" copy of a rulemaking file.

If the appellate courts do not step in and protect the APA, rulemaking in Washington State will be conducted behind closed doors under a shroud of secrecy that the rulemaking laws outlined in the APA were designed to prevent. The Appellate court should protect the APA and allow it to be read in conjunction with the PRA, rather than allow the WSLCB to play a shell game using nonexistent statutory definitions within the APA to avoid the PRA.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to grant Worthington's motion for summary judgment for costs, fees, and penalties under the PRA despite WSLCB wrongfully and silently withholding public records and failing to provide an adequate privilege log.

2. The trial court erred by ruling RCW 34.05.370 could not determine what a rulemaking file is for the purposes of the PRA.

3. The trial court erred by adding words to RCW 34.05.370 when it ruled Worthington was required to ask for non-statutory definitions of a rulemaking file.

4. The trial court erred by rendering RCW 34.05.370 (h) useless and created an absurd result.

5. The trial court erred by ruling Worthington was required to notify the agency of missing documents before filing suit.

6. The trial court erred by failing to rule WSLCB purposely withheld hundreds of documents from Worthington.

A. Issues Pertaining To Assignments of Error.

1. The trial court erred by not awarding costs, fees, and penalties to Worthington after the WSLCB violated the PRA by silently withholding records and failing to conduct an adequate search.

2. The trial court erred by allowing WSLCB to conduct an inadequate search, silently and wrongfully withhold records from Worthington, and by failing to provide an adequate privilege log.

3. The trial court erred when it failed to read the PRA in unison with the APA and consult RCW 34.05.370, to determine if there was a distinction between an "Original", "final" or "working" copy of a rulemaking file.

4. The trial court erred when it allowed the WSLCB to render RCW 34.05.370 (h) superfluous by allowing WSLCB to place documents in the rulemaking file, use them for rulemaking and then remove them after rulemaking.

5. The trial court erred adding words to RCW 34.05.370, when it allowed the WSLCB creation of a "working" and "final" copy of a rulemaking file.

6. The trial court erred ruling Worthington was required to provide notice of missing documents prior to filing suit, after the WSLCB stated it "withheld no documents?"

7. The trial court erred when it failed to rule the rule making file could not be permanently altered to remove hundreds of documents after the board looked at them to during rulemaking for I-502.

8. The trial court erred when it failed to rule the WSLCB was in violation of the PRA by withholding hundreds of documents it claimed not to have but obviously did have.

III. STATEMENT OF THE CASE

In 2013, in Thurston County Superior Court case No. 13-2-02227-1, Arthur West made a public records request to the Washington State Liquor Control Board for the I-502 rulemaking file.[1] That request turned up several redacted documents. West challenged those redactions, and the WSLCB argued the documents were placed in the rulemaking file by mistake. WSLCB argued the documents were part of a

[1] **CP 502**

"working" copy of the rulemaking file that did not have to be disclosed. The trial court Judge ruled that because the WSLCB placed the redacted documents in a "public file" that WSLCB had waived the attorney client privilege and invoked RCW 34.05.370 (h) which made the documents a permanent part of a public file. **CP 484-527, CP 20-61**

On February 18, 2015, and February 25, 2015, plaintiff submitted PRA requests to view the entire I-502 rule making file for all the I-502 rules.[2] On May 7, 2015 Bob Schroeter of the WSLCB stated that "no records have been withheld and no information had been redacted." **CP 203**

On March 3, 2016, Bob Schroeter of the WSLCB claimed that previous versions of the rulemaking files no longer existed[3] and that there was now only a "final copy." **CP 14**

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[2] **CP 14, CP 204-205**

[3] WSLCB has always maintained the other rulemaking files did not exist. **CP 300**

On May 7, 2015, WSLCB provided Worthington with 423 MB of records that they claimed was the "initial" rulemaking file. None of the redacted documents identified in case No. 13-2-02227-1, were given to Worthington. **CP 15-17**

On, May 11, 2015, the WSLCB gave a version of the rulemaking file to Liz Hallock.[4] That file contained 661 MB. The WSLCB gave Hallock the redacted documents[5] identified in case No. 13-2-02227-1 after Hallock filed a lawsuit.[6] Hallock alleged WSLCB told her she would need a time machine to view to original rulemaking file. **CP 176-177**

On October 29, 2015, the WSLCB gave a huge version of the rulemaking file to John Novak. That PRA response for a request for the rulemaking file was 1.37 GB, and contained the redacted documents identified in case No.13-2-02227-1.[7] Novak wrote a declaration that he had seen all the responses

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[4] **CP 160-170. Hallock's request is seen on CP 212.**
[5] **CP 326,328**
[6] **CP 213, CP170-175 CP 221-226**
[7] **CP 269**

and that his response on October 29, 2016 was larger than the file sent to Worthington. **CP 84**

On October 31, 2016, Worthington notified the WSLCB, the attorneys for the AG that represented them, and other agencies that documents had been illegally removed from the I-502 rulemaking file. Worthington sent a substantial amount of documents he alleged was missing from the rulemaking file.[8] Prior to that Worthington had informed the WSLCB attorney that the rulemaking file was missing documents. **CP 377-434**

On December 4, 2015, there was a motion hearing for a WSLCB dismissal and Worthington's motion for summary judgment. Judge Erik Price denied both motions.

On December 7, 2015, Worthington filed another complaint under the PRA. That case was consolidated with the previous PRA case regarding a PRA request for the I-502 rulemaking file.

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[8] **CP 368-434, CP 265**

On February 16, 2016, WSLCB sent Worthington a response to a PRA request for the rulemaking files sent to Hallock, Novak and Fore. Worthington downloaded the July/September Novak request from 420leaks.com. The redacted AG documents and handwritten notes mentioned in case No. 13-2-02227-1 were still available in the rulemaking file given to Hallock and Novak. **CP 20-61, CP 259, CP 269**

On April 1, 2016, the trial court heard cross motions for summary judgment, and ruled in favor of WSLCB. On April 11, 2016 Worthington filed a motion to consider which was denied on May 6, 2016.

On May 20, 2016 Worthington filed this timely Appeal to the Washington State Court of Appeals For Division II.

IV. ARGUMENT

A. The trial court erred when it failed to rule Worthington met the burden under the Summary Judgment Standard

Summary Judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).

The burden is on the moving party to demonstrate there is no genuine issue of material fact and, as a matter of law, summary judgment is proper. *Jacobsen*, 89 Wn.2d at 108. If the moving party satisfies its burden, then the non-moving party must present evidence demonstrating material facts are in dispute. Atherton Condo Ass'n v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). The non-moving party must "set forth specific facts showing there is a genuine issue for trial." *LaPlante,* 85 Wn.2d at 158. A non-moving party may not oppose a motion of summary judgment by nakedly asserting

there are unresolved factual questions. Bates v. Grace United Meth. Church, 12 Wn. App. 111, 115, 529 P.2d 466 (1974).

Worthington meets his burden, because there are no genuine issues of material fact whether the WSLCB had withheld responsive records. Even if the WSLCB was correct about there being multiple versions of a rulemaking file, the declaration of Karen McCall confirms that all the rulemaking files are held in the same location[9] (the director's office) by only one person (Karen McCall) and should have been produced or identified because they would have been responsive to Worthington's "encompassing" request.

In Neighborhood Alliance of Spokane County v. Spokane County, the Supreme Court held that the adequacy of a search for public records under the PRA is the same as exists under the federal Freedom of Information Act. Under this approach, the focus of the inquiry is not whether responsive documents do in

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[9] **CP 499**

fact exist, but whether the search itself was adequate. The adequacy of a search is judged by a standard of reasonableness, that is, the search must be reasonably calculated to uncover all relevant documents. What will be considered reasonable will depend on the facts of each case. Neigh. Alliance of Spokane County v. Spokane County, 172 Wn.2d 702, 714-15, 261 P.3d 119 (2011) (quoting RCW42.17A.001) (citations omitted).

It should have been reasonably calculated that all rulemaking files would be found with Karen McCall at the director's office. The SEPA rulemaking files were held at one time by Ingrid Mungia[10], however, Mungia was no longer with WSLCB, and McCall has stated under oath that "all agency staff are instructed to forward any comments on rulemakings that they receive to me for collection and dissemination to the board members." **CP 486**

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[10] **CP 492**

Here, WSLCB never adequately argued that other rulemaking files were located elsewhere and could not have been located by an adequate search. WSLCB argued Worthington did not say the magic words "final" or "working" copy and then argued Worthington should have informed the board of missing documents not missing versions of rulemaking files WSLCB has always maintained it did not have.[11] Not only was Worthington required to play go fish, he was required to perform a mind reading act rival to that of the great Carnac.

WSLCB has admitted on the record via declaration of Bob Schroeter and Karen McCall that Worthington was only given a pared down rulemaking file in his records request [12] Neither of them was authorized by the board to create a final or working copy of a rulemaking file and none of the board members corroborated the story of Bob Schroeter and Karen McCall. **CP 448, CP 461, CP 472**

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[11] **CP 300, CP 375**
[12] **CP 203, CP 304, CP 527, CP 529**

The WSLCB violated the PRA by unreasonably denying disclosure, failing to disclose records, silently withholding records, failing to conduct an adequate search, failing to provide an adequate exemption log, and/or by claiming exemptions that are improper and invalid in regard to records that are required by law to be available for public inspection." agencies having public records should rely only upon statutory exemptions or prohibitions for refusal to provide public records. "Laws of 1987, ch. 403, § 1, at 1546; PAWS, 125 Wash.2d at 259, 884 P.2d 592.

Here, the WSLCB was allowed to use case law outside the statutory exemptions to create a new statutory definition of a rulemaking file. The PRA should have been read in unison with the APA,[13] but the trial court allowed the WSLCB to sidestep the PRA and render RCW 34.05.370 (h) useless, while adding words to the rest of RCW 34.05.370.

[13] Judge Schaller did just that in the West v. WSLCB case. **CP 514**

By its acts and omissions, as described above, the WSLCB violated the Public Records Act, RCW 42.56, by unreasonably delaying or denying disclosure of records, silently withholding records, failing to provide a reasonable estimate, failing to provide a proper privilege log identifying the withheld documents, destroying records, and failing to produce records in a timely manner or otherwise, failing to conduct a reasonable search and failing to assert valid exemptions, and by asserting improper exemptions, and they did so unreasonably, damaging plaintiff, for which they are liable for the relief requested below.

Worthington alleges there is no such thing as a "final" or "working copy" of the rule making file and until Worthington is provided the original rulemaking file, WSLCB will continue to be in violation of the provisions of the PRA.

The WSLCB made a mistake by placing documents they did

not want the public to see into the rulemaking file[14] and decided to fabricate non-statutory terms in RCW 34.05.370 again, hoping another judge would this time give them a favorable ruling after Judge Schaller shot down those attempts in case No. No.13-2-02227-1. The new trial court judge accommodated WSLCB, even though it was bound by RCW 2.08.160 to uphold Judge Schaller's ruling. WSLCB laid the groundwork for removing the redacted documents reasoning the order had not been signed. [15] Regardless, it was proven the redacted documents were still in the possession of WSLCB, when they provided those redacted documents to Hallock and Novak.[16]

The trial court erred by failing to read the PRA in unison with the APA and allowing the WSLCB to add words to RCW 34.05.370 that the legislature did not include. (See Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598

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[14] **CP 521**
[15] **CP 207-208**
[16] **CP 259, CP 269**

(2003) ("court must not add words where the legislature has chosen not to include them.") ; Duke v. Boyd, 133 Wash. 2d 80,942 P.2d 351 (1997). (courts may not add words to statute even if it believes the legislature intended something else but failed to express it).

The trial court also erred when it failed to give effect to the plain meaning of RCW 34.05.370 (h) . "In the absence of ambiguity, we will give effect to the plain meaning of the statutory language." In re Marriage of Schneider, 173 Wash.2d 353, 363,268 P.3d 215 (2011) .

Here the trial court failed to give effect to the plain meaning of RCW 34.05.370 (h), and the statute was rendered superfluous. "We also interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous." (See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). There is only one rulemaking

file statute, RCW 34.05.370 and the trial court rendered it superfluous and meaningless. All the trial court rulings should be reversed and remanded to apply the APA and PRA equally and in unison because the APA was the only relevant statute concerning a rulemaking file.[17] The ruling was contrary to longstanding principles of statutory interpretation. See, e.g., Bostain v. Food Exp., Inc., 159 Wn.2d 700, 711, 153 P.3d 846 (2007) ("We must, of course, read the statute in conjunction with other relevant provisions."). Since the APA was the most specific statute for determining what a rulemaking file is it should have been consulted.

With this ruling, now, any agency could not only frustrate the PRA, by creating its own definitions of a rulemaking file, they could also frustrate the APA by being allowed to shuffle documents in and out of the rulemaking file at will without any

[17] Where multiple statutes govern the same subject matter, courts must also give effect to all of the statutes to the extent possible. In re Estate of Kerr, 134 Wn.2d 328 343, 949 P:2d 810 (1998); State v. McChristian, 158 Wn. App. 392, 241 P.3d 468 (2010), review denied, 171 Wn.2d 1003 (2011)

consequences. Any agency could develop rules without allowing the public to see how that agency developed those rules. This would be the epitome of an absurd result. "We avoid a reading that produces absurd results. Id. (quoting State v. Delgado, 148 2d723, 733, 63 P.3d 792 (2003).

B. The trial court erred when it failed to rule WSLCB violated the PRA Legal Standard.

"The primary purpose of the PRA is to provide broad access to public records to ensure government accountability." Livingston v. Cedeno. 164 Wn.2d 46,52, 186 P.3d 1055 (2008). The legislature stated clearly that the people "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know." LAWS OF 1992, ch. 139, § 2 (codified at RCW 42.56.030). When an agency withholds or redacts records, its response "shall include a statement of the specific exemption authorizing the withholding of the record (or part) and a brief explanation of how the exemption applies to the record withheld." RCW

42.56.210(3); see PAWS II, 125 Wn.2d at 270. The purpose of the requirement is to inform the requester why the documents are being withheld and provide for meaningful judicial review of agency action. See PAWS 11, 125 Wn.2d at 270; Sanders v. State, 169 Wn.2d 827,846,240 P.3d 120 (2010). An agency may not "silently withhold" a public record "because it gives requestors the misleading impression that all documents relevant to the request have been disclosed." See Zink: II, 162 Wn. App. at 71 L ·"The agency's failure to properly respond is treated as a denial of records." Soter v. Cowles Pub'g Co., 162 Wn.2d 716, 750, 174 P .2d 60 (2007). "Prevailing against an agency requires an order that withheld records must be disclosed." City of Lakewood v. Koenig, 160 Wn. App. 883, 896, 250 P.3d 113 (2011). Here, WSLCB violated the PRA by denying Worthington access to part of the requested records without including a statement of the specific statutory exemptions and a brief explanation of how the exemptions apply (exemption statement). The burden is on the agency to

show a withheld record falls within an exemption, to identify the document withheld and to explain how the specific exemption applies. See Sanders v. State, 169 Wn.2d 827, 845-46, 240 P.3d 120 (2010)

Here, the trial court allowed the WSLCB to define what a rulemaking file is and then withhold those records and frustrate the PRA by creating a non-statutory term for a rulemaking file out of whole cloth. Rather than require the WSLCB to cite an exemption, the trial court erred when it allowed WSLCB to play Houdini with non-existent statutory versions of a rulemaking files it claimed no longer existed only resurface for two other PRA requests for the same I-502 rulemaking file.

The trial court also allowed the WSLCB to refer to the APA in its declarations (RCW 34.05.370 (3) and during oral argument, but forbade Worthington to harmonize the statute using a different subsection of the same statute (RCW 34.05.370 (h). It is important to note that the WSLCB previously lost on this issue in the West case after Judge

Schaller ruled that the redacted AG documents were now part of the rulemaking file. The documents withheld from Worthington were already identified as being part of the rulemaking file after the WSLCB waived the attorney client privilege by placing the records in the rulemaking file. (RCW 34.05.370 (h) required those records to be kept in the file and given to Worthington. The trial court blatantly allowed the WSLCB to tamper with a public record and get away with it.

If the WSLCB wanted to exempt its deliberative process they should not have placed the documents in the rulemaking file, used them to make rules and then pull them out. They should have used the exemptions in the PRA under RCW 42.56.280 which exempts from public inspection and copying:

> Preliminary drafts, notes, recommendations, and intra-agency memorandums in which opinions are expressed or policies formulated or recommended except that a specific record shall not be exempt when publicly cited by an agency in connection with any agency action.

The purpose of this exemption is to "protect an agency's deliberative process, and this purpose —severely limits its scope." Hoppe, 90 Wn.2d at 133. In order for intra-agency documents to be exempt:

> an agency must show that the records contain pre decisional opinions or recommendations of subordinates expressed as part of a deliberative process; that disclosure would be injurious to the deliberative or consultative function of the process; that disclosure would inhibit the flow of recommendations, observations, and opinions and . . . that the materials covered by the exemption reflect policy recommendations and opinions and not the raw factual data on which a decision is based. (PAWS II, 125 Wn.2d at 256 (citing Columbian Publ'g Co., 36 Wn. App. at 31-32).

This exemption affords protection only until the policies or recommendations contained in the requested documents have been implemented. Dawson, 120 Wn.2d at 793; see also PAWS II, 125 Wn.2d at 257; West v. Port of Olympia, 146 Wn. App. 108, 112, 192 P.3d 926 (2008) (affirming that once an agency implements a policy or recommendation, records pertaining to

that policy or recommendation no longer fall within the ambit of the deliberative process exemption of the public records act.)

Here, the PRA shows that an agency deliberative process and its actions could have been protected under the PRA, but WSLCB chose to sidestep the PRA altogether. The PRA could have been read in unison with the APA,[18] but the trial court allowed the WSLCB to silently withhold other versions of a rulemaking file and render RCW 34.05.370 (h) useless, while adding words to the rest of RCW 34.05.370.

By its acts and omissions, as described above, the WSLCB violated the Public Records Act, RCW 42.56.070, by unreasonably delaying or denying disclosure of records, silently withholding records, failing to provide a reasonable estimate, failing to provide a proper privilege log identifying the withheld documents, destroying records, and failing to produce records in a timely manner or otherwise, failing to conduct a reasonable

[18] Judge Schaller did just that in the West v. WSLCB case.

search and failing to assert valid exemptions, and by asserting improper exemptions, and they did so unreasonably, damaging plaintiff, for which they are liable for the penalties under the PRA.

Worthington alleges there is no such thing as a "final" or "working copy" of the rule making file and until Worthington is provided the original rulemaking file, WSLCB will continue to be in violation of the provisions of the PRA.

WSLCB made a mistake by placing documents they did not want the public to see into the rulemaking file and decided to fabricate non-statutory terms in RCW 34.05.370, in order to bypass the PRA process, then claim Worthington failed to request non-statutory terms, after one Judge had already ruled the APA made no such distinctions..

The trial court erred by allowing the WSLCB to add words to RCW 34.05.370 that the legislature did not include. (See Rest. Dev., Inc. v. Cananwill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598

(2003) ("court must not add words where the legislature has chosen not to include them.") ; Duke v. Boyd, 133 Wash. 2d 80,942 P.2d (1997). (court may not add words to statute even if it believes the legislature intended something else but failed to express it). The trial court also erred when it failed to give effect to the plain meaning of RCW 34.05.370 (h) . "In the absence of ambiguity, we will give effect to the plain meaning of the statutory language." In re Marriage of Schneider, 173 Wash.2d 353, 363,268 P.3d 215 (2011) .

Here, the trial court failed to give effect to the plain meaning of RCW 42.56.100, and RCW 42.56.070 rendering those statutes superfluous. "We also interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous." (See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting Davis v. Dep't of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). And we avoid a reading that produces absurd results. Id. (quoting State v. Delgado, 148

2d723, 733, 63 P.3d 792 (2003)

WSLCB failed to provide full public access to public records, to protect public records from damage or disorganization and was allowed to destroy records previously found by a court of record to be part of a public record in the rulemaking file for I-502.

There is nothing more absurd than allowing an agency to create non-statutory terms for a rulemaking file governed by a statute and turn the PRA into a perpetual game of go fish. All an agency would have to do is keep creating fictitious names for a rulemaking file and withhold the records because the requestor could not identify a term not identified in the only statute that defines what a rulemaking file is. This scenario is not only absurd it is preposterous.

C. The trial court erred when it failed to rule WSLCB silently withheld responsive records from Worthington.

The PRA "treats a failure to properly respond as a denial." Accordingly, this the Courts of Appeals have repeatedly held that the PRA requires the trial court to assess a daily penalty where the agency erroneously withholds a requested public record. Yousoufian v. Office of Ron Sims, 152 Wn.2d 421, 440, 98 P.3d 463 (2004); see also Neighborhood Alliance, 172 Wn.2d at 727 (penalty provisions of PRA are triggered when agency fails to properly disclose and produce records); Freedom Found. v. Washington State Dep't of Transp., Div. of Washington State Ferries, 168 Wn. App. 278, 303,276 P.3d 341, 353 (2012).

Here, the WSLCB failed to disclose it had other versions of the rulemaking file in the "Director's Office" and remained silent on those versions after they claimed no other versions existed. When Worthington obtained them a year later he did not ask for the "working" or "final" copy he asked for the requests given to Elizabeth Hallock and John Novak. This shows that the WSLCB and trial court were mistaken when

they claimed the records could only be identified by requesting the "final" or "working" copy. This also shows the WSLCB was not truthful when they claimed other versions of the rulemaking file no longer existed.

Under the PRA, on the motion of a person who has been denied an opportunity to inspect or copy a public record, the superior court may require an agency to show cause why it has refused to allow inspection or copying. RCW 42.56.550 (1). The agency bears the burden to show that the refusal complies with a statutory exemption. RCW 42.56.550 (1). Here, the refusal to comply was based on a complete fabrication that the records sought no longer existed, and a claim that the agency only maintained a "final" rulemaking file. The agency placed documents in a public rulemaking file and then removed them or concealed them from Worthington in violation of the PRA, under the guise of a non-existent statutory "final" copy of a rulemaking file under RCW 34.05.370.

WSLCB withheld the redacted AG documents and other documents from Worthington in bad faith while they provided the redacted AG documents to Elizabeth Hallock and John Novak. **CP 259, CP 269**

The trial court's ruling determined that Worthington did not request the "working " copy of the rulemaking file, but that definition cannot be found in RCW 34.05.370. The trial court rendered RCW 34.05.370 (h) useless and also added the words "working" and "final" copy. The trial court erred when it did so and its ruling should be reversed and remanded with orders to proceed with the penalty phase of the PRA.

D. The trial court erred when it failed to rule WSLCB failed to provide a privilege log.

"The PRA is a strongly worded mandate for broad disclosure of public records." (See Rental Hous. Ass'n of Puget Sound v. City of Des Moines, 165 Wash.2d 525, 535, 199 P.3d 393 (2009). On January 22, 2009, the Washington State Supreme Court decided Rental Housing Ass'n of Puget Sound

v. City of Des Moines, 165 Wn.2d 525 (2009), which changed the form and content of an acceptable privilege/exemption log. In Rental Housing, the Court clarified that the following information is required to be included in any, all privilege, exemption or other withholding logs: type of document/description of document; date; author/sender; recipient (including cc's) if applicable; statutory exemption and brief explanation for withholding.

The Court further clarified that the "brief explanation" should provide enough information for a requestor to make a threshold determination of whether the claimed exemption is proper. Nonspecific claims of exemption such as "proprietary" or "privacy" are insufficient. Any log which fails to include any of these minimal details may be deemed insufficient or noncompliant with the PRA, thereby subjecting the agency to mandatory penalties and attorneys' fees.

Here, WSLCB merely hid documents and withheld non statutory versions of a rulemaking files which were all kept in

the same location according to Karen McCall the rules coordinator. WSLCB failed to provide a privilege log and should be deemed noncompliant and subject to the maximum award under RCW 42.56.550 (4) for acting in bad faith.

When Worthington attempted to view the rule making file, the documents Judge Schaller ruled were part of the file that were submitted as exhibits in the West case, were missing from the rule making file. When Worthington questioned why documents were missing the WSLCB replied:

> "On February 19, 2015, you requested to review on February 23, 2015, the entire 1-502 rulemaking file which is the rulemaking file for the Board's original adoption of chapter 314-55 WAC in 2013. Although I have not personally maintained the rulemaking file, my staff and I were pleased to accommodate the visit based upon your request made pursuant to RCW 34.05.370. **"Prior draft versions of the rulemaking file, prior to adoption of the 1-502 rules, no longer exist** as rulemaking files are continuously updated until completed and finalized upon adoption of rules. This is the final rulemaking file for the Board's original adoption of chapter 314-55 WAC that you inspected.[19] **CP 14**

[19] The Board refused to corroborate this fact under oath in their answers to interrogatories in another court case. **CP 448, CP 461, CP 472**

However, the rule making file maintenance requirement in 34.05.370 specifies that anything placed in the rule making file becomes part of the rulemaking file. RCW 34.05.370 (h) reads in relevant part:

> (1) Each agency shall maintain an official rule-making file for each rule that it (a) proposes by publication in the state register, or (b) adopts. The file and materials incorporated by reference shall be available for public inspection. (2) (2) The agency rule-making file shall contain all of the following:
>
> **(h) Any other material placed in the file by the agency.**

Judge Schaller ruled that once the rules coordinator had placed the redacted AG documents in the rulemaking file, WSLCB waived the attorney client privilege and ruled the documents were now part of the official public record. After Judge Schaller ruled on the issue, WSLCB settled out of court with the requestor and then illegally removed the redacted AG documents from the I-502 rulemaking file and withheld those documents and others from Worthington.[20]

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[20] WSLCB managed to find the documents for the May 11, 2015 Liz Hallock request and the October 29, 2015 response to the July 2015 PRA request by John Novak.

Worthington respectfully argues that the WSLCB had the original rule making file all along and chose to conceal it rather than comply with the PRA. There are no genuine issues of material fact, and Worthington is entitled to judgment as a matter of law. Worthington verifies that he has reviewed both the "final copy" sent to him and the "original copy" previously sent to John Novak: and has printed up many documents that are in the original rule making file that are not in the final copy. The court need not rely on that verification due to the fact the WSLCB has admitted to removing documents from the original file to create a "final copy" and to create an administrative record for a APA case involving Arthur West.[21]

E. **The trial court erred when it failed to grant relief pursuant to CR 59 (a) (2).**

Worthington has alleged fraud and misconduct on the part of the defendant. Specifically, Worthington alleges that WSLCB knew that Karen McCall had deferred to the board when determining what a rulemaking file would be. The

[21] **CP 527,CP 529, CP 203, CP 304**

WSLCB also knew that the board answered interrogatories stating that they did not request that a "working" or "final" copy of the rulemaking file be made.[22]

Despite knowing McCall had deferred to the board, and despite knowing the board declared under oath it did not authorize a "working" or "final" copy to be created, WSLCB presented an argument to the court that relied upon the declarations of Bob Schroeter and Karen McCall to authenticate the creation of "working" or "final" copy, even though they knew McCall had deferred to the board and even though they knew the board declared under oath it did not authorize a "working" or "final" copy to be created. Because the issue of what a rulemaking file was in fact deferred to the board, and because the board never authorized a "working" or "final" copy , the declarations of Bob Schroeter and Karen McCall and their descriptions of what happened to the rulemaking file became

[22] **CP 448, CP 461, CP 472**

irrelevant evidence and should have not been admitted as evidence or be continued to be relied upon as evidence. "The erroneous admission of irrelevant evidence can constitute sufficient prejudicial error to warrant the grant of a new trial." See, Liljeblom v. Dept. of Labor & Industries, 57 Wn.2d 136, 356 P.2d 307 (1960).

Here, neither Worthington nor the court had any idea that McCall could not have actually created a "working" or "final" copy so the withheld declarations and discovery answers were tantamount to misconduct and fraud. Worthington respectfully requests the motion to reconsider be granted pursuant to CR 59 (a) (2), because the WSLCB purposely made a fraudulent argument utilizing declarations that resulted in a trial by false affidavit.[23]

Worthington can properly challenge the declarations of Karen McCall and Bob Schroeter under the rules of evidence in ER 608 and ER 609, and admissibility under the rules of

[23] See Chapter 9A.72 RCW. Pursuant to RPC 3.3 (c), the AG is required to notify the court of the falsity of the Schroeter and McCall declarations.

hearsay which Worthington has done. WSLCB provided a declaration from Bob Schroeter claiming there was a "final" rulemaking copy made, while knowing that McCall deferred to the board and knowing the board answered interrogatories in a different case claiming they did not authorize a "working" or "final" copy of a rulemaking file or authorize the removing of any files at all which would also shoot down the "initial" copy theory[24] provided by the WSLCB and Schroeter. "Knowingly making an untrue statement to a public servant is proscribed by RCW 9A.76.020, and "is clearly a crime which involves a false statement and is admissible under ER 609 (a) (2)." State v. Burton, 33 Wn. App. 417, 420, 655 P.2d 259 (1982), rev 'd on other grounds, 101 Wn.2d 1, 676 P.2d 975 (1984), overruled on other grounds by State v. Ray, 116 Wn.2d 531, 543-45, 806 P.2d 1220 (1991). Without these declarations there is nothing left to support WSLCB's motion.

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[24] The WSLCB alleges it gave Worthington an "initial" rulemaking file, but also declares under oath there is only a "final" copy that remains, while they knew the board never authorized either. (See CR 59 (a) (2)

Worthington also alleged Schroeter's declaration was hearsay.[25] When a hearsay statement, or a statement defined in rule 801 (d) (2) (iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. WSLCB did not respond to the issue of hearsay and conceded Schroeter's declaration was hearsay. As shown above, Worthington's evidence that Karen McCall declared under oath that she differed to the board on the issue of what a rulemaking file and the board's answers to interrogatories were admissible.

F. The trial court erred when it failed to grant relief pursuant to CR 59 (a) (1).

Because the evidence shows Bob Schroeter and Karen McCall's declarations were irrelevant and because McCall deferred to the board and the board never authorized an "Initial", "Working" and "Final" copy of a rulemaking file,

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[25] Grounds for reconsideration due to evidentiary error pursuant to CR 59 (a) (8).

there is no evidence or reasonable inference from the evidence to justify the verdict or the decision. The decision is also contrary to law because McCall identified the statute (RCW 34.05.) in her declaration, but the statute does not contain the words "Initial", "Working" and "Final" copy of a rulemaking file. The ruling and order relied upon fiction and fraud. The motion to reconsider should be granted pursuant to CR 59 (a) (1).

G. The trial court erred when it failed to grant relief pursuant to CR 59 (a) (9).

Cumulative errors, misconduct, and events which occurred at the time of trial prevented the Plaintiffs from having a fair trial and justify the grant of a new trial pursuant to CR 59(a) (9) because, the Court should be left with an abiding belief that in this case "substantial justice has not been done. The only way to provide substantial justice is to either allow Worthington to argue APA issues or strike all APA briefing and arguments that rely on interpretations of rulemaking files.

Here, the trial court allowed WSLCB to brief and argue under RCW 34.05, and interrupted Worthington when he tried to do the same.[26] In the declaration of Bob Schroeter, arguments were made that documents could be removed from the rulemaking file pursuant to RCW 34.05.370 (3). When Worthington tried to approach the bench to illustrate that issue in his notice of objection and in the reply to the WSLCB motion for summary judgment, the court refused to accept the documents and eventually continued to allow the WSLCB to argue matters regarding the APA. Then the court allowed the WSLCB to use terms describing a rulemaking file [27] which the WSLCB new prior to briefing and arguing were never authorized by the board. Then the trial court incorporated those terms in its ruling without knowing Karen McCall deferred to the board for the rulemaking file issues, or without knowing the board never authorized the creation of those rulemaking

[26] This was an irregularity in the proceeding under CR 59 (a) (1), that prevented Worthington from getting a fair bench trial.
[27] "Initial", "Working" and "Final" copy of a rulemaking file.

versions.[28] The trial court used the terms "initial", "working", and "final" copy of the rulemaking file in its ruling, despite those versions of the rulemaking file were never authorized to be created by the board, after McCall declared she deferred that decision to the board.

Worthington was prevented from having a fair bench trial because he was not allowed to argue about RCW 34.05, when the WSLCB was enabled to, and because the WSLCB submitted irrelevant evidence in the form of fraudulent and hearsay declarations from Bob Schroeter and Karen McCall. Situations where reconsideration has been granted under CR 59(a) (9) include instances where such a large accumulation of errors requires a court to order a new trial or reconsideration. See State v. Badda, 63 Wn.2d 176,358 P.2d 859 (1963) and State v. Marks, 71 Wn.2d 295, 427 P .2d 1008 (1967). In this case, the trial court and WSLCB caused numerous accumulations of error and the motion to reconsider should be

[28] The trial court ruled Worthington failed to request a "working" copy of the rulemaking file.

granted. (See, Storey v. Storey, 29 Wn.App. 370, 585 P.2d 183 (1978) (Even if one error, alone, would not justify a new trial, the accumulative effect of multiple errors may justify a new trial pursuant to CR 59 (a) (9).

H. **The trial court erred when it failed to grant relief pursuant to CR 59 (a) (8).**

The WSLCB failed to identify a statute or relevant case law that requires a requestor to inform an agency of missing documents prior to filing suit. The only requirement is to wait two days prior to filing. WSLCB avers no response to this issue so the motion to reconsider should be granted pursuant to CR 59 (a) (8). The issue of the admissibility of Exhibit 1 is moot. WSLCB objected to new evidence and they wanted the trial court to uphold a ruling obtained by using a legal theory they knew was not supported by previous declarations they provided in other cases. Now they rely on legerdemain technicalities in hopes the trial court will throw out the evidence in order to preserve the ruling they obtained while knowing the

declarations of WSLCB employees contradicted the declarations and answers to interrogatories they provided to the court in other cases. Worthington respectfully prays that the trial court resists the temptation to stay in the infested bed with the WSLCB and grant Worthington's motion to reconsider.

V. CONCLUSION

Worthington respectfully requests a ruling under seal of this court that WSLCB violated the Public Records Act, by deliberately failing to reasonably disclose records, silent withholding of public records, destruction of records, failure to provide an adequate privilege log, failure to disclose records in a timely fashion without unreasonable delay, and/or the assertion of improper and invalid exemptions.

Worthington also respectfully requests a remand back to the trial court with orders to move straight to the penalty phase of the PRA to determine the penalties, fees, or criminal charges for permanently destroying a public record.

Worthington also respectfully requests a remand to the trial court so that he can be awarded costs, attorney fees, and per diem penalties from the WSLCB for its bad faith actions in failing to comply with the PRA, failing to reasonably disclose records in a timely manner, silent withholding, unreasonable and unlawful withholding of records and failure to assert valid exemptions, assertion of improper and invalid exemptions, and its refusal to perform a valid search or produce a valid and adequate exemption log, with penalty and fees for each day that each public record and/or exemption log is found to have been unlawfully withheld up to the date they are or have been disclosed.

Respectfully submitted this 4th day of August, 2016

BY _____

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Declaration of Service

I declare that on the date and time indicated below, I caused to be served Via email, and personal service a copy of the documents and pleadings listed below upon the attorney of record for the defendants herein listed and indicated below.

1. APPELLANT'S AMENDED OPENING BRIEF

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE
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Tacoma WA. 98401

COA DIVISION II
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Tacoma, WA 98402

I declare under penalty of perjury under the laws of the United States that

the foregoing is True and correct.

Executed on this 4TH day of August, 2016.

BY John Worthington

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